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the insured survived. This changes the common law by establishing a presumption that the beneficiary died first.

The statute raises an additional problem which should be mentioned. The general rule seems to be that one person has no legal right to effect life insurance upon the life of another without his consent, but K.R.S. 297.140 provides that a married woman may, without the consent of her husband, contract, pay for, take out and hold a policy of insurance upon the life of her husband. The Kentucky Court, however, has held in a number of cases that a policy effected on the husband's life without his consent is against public policy and void. It is also held that, where the wife pays for the premiums on such policies from household funds or from his money, he may recover the sums so paid from the insurance company.[15]

IRA G. STEPHENSON

THE EFFECT OF THE MARRIED WOMAN'S SURETYSHIP STATUTE IN KENTUCKY

Under the common law a married woman's contract of suretyship was void[1] and a mortgage or other conveyance given by her as security for the debt of another was likewise void.[2] K. R. S. 404.010 (2), which replaced a narrower statute,[3] provides: "No part of a married woman's estate shall be subjected to the payment or satisfaction of any liability on a contract made after marriage to answer for the debt of another, including her husband, unless the estate has been set apart for that purpose by mortgage or other conveyance." It will be seen that the statute, instead of restricting the power of married women to enter into contracts of suretyship, actually extends it by providing a method by which she can set aside her property as security for the debt of another.

The statute, seemingly clear, has not always proved easy of application. The difficulty is in determining in what situations the married woman is a surety, especially in the cases where she signs a note as a principal either as the sole principal or as a co-maker. The Court of Appeals has laid down two principles for guidance:

[15] Metropolitan Life Insurance Co. v. Smith, 22 K. L. R. 868, 59 S. W. 24, 53 L. R. A. 817 (1900); Metropolitan Life Insurance Co. v. Blesch, 22 K. L. R. 530, 58 S. W. 436 (1900); Metropolitan Life Insurance Co. v. Selhorst, 21 K. L. R. 912, 53 S. W. 524 (1899); Metropolitan Life Insurance Co. v. Trende, 21 K. L. R. 909, 53 S. W. 412 (1899); Metropolitan Life Insurance Co. v. Monohan, 102 Ky. 13, 42 S. W. 924 (1897).

[1] Underhill v. Meyer, 174 Ky. 229, 192 S. W. 14 (1917).

[2] Merchant's and Mechanic's Bldg. and Loan Assoc. v. Jarvis. Adm'r, 92 Ky. 566 (1892); Hirshman v. Brashears, Etc., 79 Ky. 258 (1881).

[3] Kentucky General Statutes (1888), c. 52, art. 2, sec. 2.

(1 Each case must be decided on its own particular facts[4] and (2) the substance rather than the form will govern.[5]

The problem frequently arises in a case in which a husband, whose credit is poor, wishes to borrow money and offers a bank his note signed by his wife as surety. The bank, wishing to avoid the effect of the statute, refuses to make the loan except to the husband and wife jointly, as co-makers, or to the wife as principal with her husband as surety. In such a situation, the court, in seeking to discover the true relationship between the parties, considers: (1) Whether the husband received the proceeds of the loan and (2) whether this fact was known to the bank.

In applying the principle that substance prevails over form, even though it may appear that the parties were co-makers, the court will admit evidence that the married woman did not receive the direct benefit of the loan and that this fact was known to the bank at the time the money was advanced. For example where a wife was bound as a purchaser on a contract to buy a drug store she was held not liable on the notes she signed as co-maker with her husband in payment therefor, since the creditor knew that the business actually belonged to the husband.[6] The promise may be "we or either of us," yet if she was not in fact a principal, she is allowed to prove it and avoid liability.[7]

Not infrequently, the creditor, in an effort to strengthen his position, insists that the married woman's name be signed first. That this practice is unsuccessful is indicated by the rule that, although the order of the signatures prima facie established the relation of the parties, it is not conclusive and parol evidence may be introduced to prove in what capacity the married woman signed.[8] In all of these cases the court emphasizes that the creditor knew that the wife was merely a surety and that the form is immaterial. An excellent application of this rule is in *Smith* v. *First National Bank of Pikeville*[9] which involved two notes signed by husband and wife as co-makers. The proceeds of the first note were deposited to the wife's account and immediately paid to the husband on her check and it was held that since the money was loaned to the wife she could not escape liability. The proceeds of the second note were deposited to the husband's credit in the bank from which the loan

[4] National Bank of Kentucky's Receiver v. Snead, 267 Ky. 816, 103 S. W. (2d) 269 (1937).

[5] Bank of St. Helens v. Mann's Executor, 226 Ky. 381, 11 S. W. (2d) 144 (1928); Lucas v. Hagedorn, et al, 158 Ky. 369, 164 S. W. 978 (1914); Third National Bank v. Tierney, 128 Ky. 836, 110 S. W. 293 (1908).

[6] Simmons v. Maxey, 242 Ky. 728, 47 S. W. (2d) 530 (1930).

[7] Prater v. Elkhorn Coal Co., 253 Ky. 713, 70 S. W. (2d) 378 (1934).

[8] Peoples Bank v. Baker, et al, 238 Ky. 473, 38 S. W. (2d) 225 (1931); Mutual Benefit Life Ins. Co. v. First National Bank, Etc., 160 Ky. 538, 162 S. W. 1028 (1914); Hart v. Bank of Russellville, 127 Ky. 424, 105 S. W. 934 (1907).

[9] 243 Ky. 716, 49 S. W. (2d) 538 (1932).

was obtained and this was held to be sufficient notice that she was a surety in fact and to relieve her of liability. In one case the bank, knowing the husband was worth nothing, took the note which the wife signed as co-maker but the court said: ". . . in taking a note with him on it as maker, the bank necessarily did so on the credit of the other party . . ."[10] and that the substance of the transaction was a loan of money to the husband with his wife as surety.

In another group of cases the parties designate the wife as principal, with her husband or another as surety. As in the previous situation the court will not be led astray by the labels the parties attach to the transaction. If the creditor knows that the wife is merely a surety, recovery will be denied even though she signs on the first line and writes "principal" after her name.[11] However, in *Tompkins* v. *Triplett*,[12] the fact that the husband first tried to borrow money for himself was not sufficient to relieve the wife, who signed as principal, from liability, for, said the court, the creditor really believed the wife was the principal because she signed first. This result is contra to the holding in many other cases,[13] and the court seemed to put too much stress on the form.

A harder case is presented by a note signed by the married woman alone for it is difficult to see how she can be a surety if there is no principal. In these cases the court has introduced an element novel to suretyship contracts. If the borrowed money is used to pay the husband's debt to the bank, this alone is said to raise a presumption of suretyship,[14] but if it is to pay the husband's debt to a third person the rule does not apply.[15] It has been said: "The wife is only released from liability on an unsecured note when the proceeds are applied by the creditor to the discharge of the husband's debt."[16] Apparently this rule is confined to cases in which the wife signs alone. Certainly in no other instance does the court determine suretyship on whether the creditor does or does not receive the proceeds of the loan.

Of course where the wife receives the proceeds of the note which she signs as principal she will be held as such[17] and the same

[10] Oatts v. First National Bank of Somerset, 244 Ky. 635 at 638, 51 S. W. (2d) 952 at 953 (1932).

[11] Crumbaugh v. Postell, 20 K. L. R. 1366, 49 S. W. 334 (1899).

[12] 110 Ky. 824, 62 S. W. 1021 (1901).

[13] Allen v. Wireman, et al, 243 Ky. 156, 47 S. W. (2d) 928 (1932); Hannen v. Peoples' State Bank, 195 Ky. 58, 241 S. W. 355 (1922); Black v. McCarley's Ex'r, 126 Ky. 825, 104 S. W. 987 (1907).

[14] See National Bank of Kentucky's Receiver v. Snead, 267 Ky. 816 at 818, 103 S. W. (2d) 269, at 270 (1937).

[15] See Bank of St. Helens v. Mann's Executor, 226 Ky. 381 at 386, 11 S. W. (2d) 144 at 146 (1928).

[16] See Thomas v. Boston Banking Co., 157 Ky. 473 at 477, 163 S. W. 480 at 482 (1914).

[17] Redmon v. First National Bank of Paris, Ky., et al, 256 Ky. 659, 76 S. W. (2d) 933 (1933); Oliver v. Noe, 232 Ky. 809, 24 S. W. (2d) 592 (1930).

rule applies where she signs with her husband as co-maker.[18] The cases apparently hold that if she receives only part of the benefit she will be held as principal for the whole[19] and no case was found where her status as surety as to part and principal as to part has been discussed. Similarly, if the money is used in a business in which the married woman has an interest, she is regarded as a primary party and cannot plead the statute.[20] However, the interest must be a bona fide one and not merely for the purpose of avoiding the operation of the statute.[21]

It has been held that the statute does not prevent a married woman from borrowing money the same as an unmarried woman though she immediately lends it to another, even to her husband.[22] The fact that the lender knows that she intends to turn the proceeds over to a third person as a gift or a loan does not convert her into a surety unless the transaction is a subterfuge to evade the statute.[23]

In a certain type of case the court has injected a theory of holding the wife liable under the rule of *respondeat superior*.[24] If the husband takes a note signed by his wife, either as sole principal or co-maker, and represents that she is receiving all or part of the proceeds, it is held that she may not avail herself of the defense of the statute. This has been applied in cases in which the bank should have known that the loan was effected for the benefit of the husband. The court says that the wife appointed her husband as her agent and is bound by his representations and misrepresentations. However, in more recent cases involving what seem to be similar facts, the court has refused to apply the agency theory.[25]

Not only does the statute prevent recovery by the creditor but also a co-surety has no right of contribution against a married woman who signed as surety.[26] Nor is she liable on a note signed to indemnify another who was surety for her husband.[27]

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[18] Thomas v. Boston Banking Co., 157 Ky. 473, 163 S. W. 480 (1914).

[19] Longnecker, et al v. Bondurant, 173 Ky. 427, 191 S. W. 286 (1917); Thomas v. Boston Banking Co., 157 Ky. 473, 163 S. W. 480 (1914).

[20] Keleman v. Citizens Bank of Cumberland's Liquidating Agent, 259 Ky. 292, 83 S. W. (2d) 355 (1935); Prater v. Elkhorn Coal Co., et al, 253 Ky. 713, 70 S. W. (2d) 378 (1934); Simmerman, et al, v. National Deposit Bank of Owensboro, et al, 232 Ky. 844, 24 S. W. (2d) 912 (1930).

[21] Lucas v. Hagedorn, et al, 158 Ky. 369, 164 S. W. 978 (1914).

[22] National Bank of Kentucky's Receiver v. Snead, 267 Ky. 816, 103 S. W. (2d) 269 (1937); Redmon v. First National Bank of Paris, Ky., et al, 256 Ky. 659, 76 S. W. (2d) 933 (1934).

[23] National Bank of Kentucky's Receiver v. Snead, 267 Ky. 816, 103 S. W. (2d) 269 (1937).

[24] Deering Co. v. Veal, 25 K. L. R. 1809, 78 S. W. 886 (1904); Tompkins v. Triplett, 110 Ky. 824, 62 S. W. 1020 (1901).

[25] Allen v. Wireman, et al, 243 Ky. 156, 47 S. W. (2d) 928 (1932); Hannen v. Peoples State Bank, 195 Ky. 58, 241 S. W. 355 (1922).

[26] Porter v. Field, 8 Ky. Opin. 72 (1874).

[27] Silas Price v. N. P. Peak, Etc., 7 Ky. Opin. 108 (1873).

In order to be available as a defense, coverture must be pleaded.[28] The burden of establishing the defense rests on the party claiming it and it cannot be raised for the first time on appeal.[29] Likewise, a married woman is concluded by a judgment against her and in a proceeding on the judgment cannot avail herself of the defense.[30]

Kentucky is one of the few states in which the validity of a contract is determined by the place of performance.[31] The validity of a note is determined by the law of the place of payment. Consequently, a married woman in Kentucky can make a valid contract of suretyship in this state providing that the note is payable in a state that does not have any restriction on her capacity to be a surety[32]

It is a well established rule that since the suretyship contract of a married woman is void, it cannot be ratified after the disability of coverture is removed.[33] If she is to be bound, it must be on an entirely new contract based on a consideration other than the release of the previous void undertaking. And it has even been held that the release of the pre-existing debt of the husband is not sufficient consideration to support her promise to pay the obligation.[34] These cases are hard to justify unless there is evidence of mutual mistake, unfair dealing, or fraud. And in fact, in all but one,[35] the deceased husband's estate was insolvent. The rule was not applied where a mother, while a married woman, signed her son's note as surety, and then signed a renewal note after she was no longer under the disability of coverture. In holding her liable on the new note, the court said that the extension of time to the son was sufficient consideration and that it was a new contract as to her even though it was the old contract as to the son.[36]

A married woman having the defense of the statute against the original payee can assert it against a subsequent holder who is not a holder in due course.[37] It has always been held that notes void by

[28] Belcher, et al v. Polly, et al, 32 K. L. R. 623, 106 S. W. 818 (1908).

[29] Turner, Etc. v. Gill, Etc., 105 Ky. 414, 49 S. W. 311 (1899).

[30] Bush, et al v. Arnett, 271 Ky. 803, 113 S. W. (2d) 442 (1938).

[31] STUMRERG, CONFLICT OF LAWS (1937) p. 208, n. 2.

[32] Twentieth Street Bank v. Diehl, 260 Ky. 359, 85 S. W. (2d) 865 (1935).

[33] Rupple v. Kissel, 24 K. L. R. 2371, 74 S. W. 220 (1903); Bagby, Etc. v. Bagby, 10 K. L. R. 540 (1888).

[34] Beauchamp v. Beauchamp, 198 Ky. 185, 248 S. W. 502 (1932); Gilbert, Etc. v. Brown, 123 Ky. 703, 97 S. W. 40 (1906); Grimes v. Grimes, 28 K. L. R. 549, 89 S. W. 548 (1905).

[35] Beauchamp v. Beauchamp, 198 Ky. 185, 248 S. W. 502 (1932).

[36] Farmers' Bank of White Plains v. Williams, 205 Ky. 261, 265 S. W. 771 (1924).

[37] Clark County Bank v. Allen, 262 Ky. 236, 90 S. W. (2d) 17 (1936).

statute are void even in the hands of a holder in due course.[38] Consequently, though no case was found, it seems safe to say that the court would allow the married woman to plead coverture even against a holder in due course. In other words, if the original payee cannot collect, a subsequent holder cannot. But there is a possibility of a case where the original payee can collect and a subsequent holder cannot, as where the latter has notice that the wife was in fact a surety.

It should be noted that, under the statute, there is no method by which a married woman can become personally bound as a surety, but it does provide that she can "set aside" her property as security for the debt of another. This is usually done by a mortgage,[39] but the indorsement of stock,[40] the pledging of notes as collateral,[41] and the pledging of the proceeds of an insurance policy (together with the actual delivery of the policy)[42] have been held to constitute "setting aside" within the meaning of the statute. This creates no personal liability but only a claim as to the specific property and only to the extent of that property.[43] In no case is there an enforceable claim for a deficiency remaining after the sale of such property nor can any other property be subjected to the lien.[44]

ROSANNA A. BLAKE

LIABILITY OF RESTAURANT KEEPERS AS BAILEES OF WRAPS OF PATRONS

The liability of a restaurant keeper for clothing deposited by patrons while eating depends upon the establishment of a contract of bailment[1] or upon proof of the proprietor's negligence.[2] In order to constitute a bailment, there must be a delivery of the article, either actual or constructive,[3] and an acceptance of the subject matter, actual or implied.[4] The delivery of the article must be such

[38] See Lawson, et al v. First National Bank of Fulton, — Ky. —, 102 S. W. 324 at 325 (1907); Alexander and Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353 (1906).

[39] Brady v. Equitable Trust Co. of Dover, 178 Ky. 693, 199 S. W. 1083 (1918); Hall v. Hall, 26 K. L. R. 553, 82 S. W. 269 (1904).

[40] Staib v. German Ins. Bank, 179 Ky. 118, 200 S. W. 322 (1918).

[41] Staten, et al v. Louisville Trust Co., 289 Ky. 258, 158 S. W. (2d) 387 (1942).

[42] Wirgman v. Miller, 98 Ky. 620, 33 S. W. 937 (1896).

[43] Brady v. Equitable Trust Co. of Dover, 178 Ky. 693, 199 S. W. 1083 (1918); Magoffin v. Boyle National Bank, 24 K. L. R. 585, 69 S. W. 702 (1902).

[44] Tipton v. Traders' Deposit Bank, 17 K. L. R. 960, 33 S. W. 205 (1895).

[1] Maher v. Chaplin's Lunch, 119 Pa. Super. 213, 180 Atl. 739 (1935); 32 C. J. 558.

[2] Montgomery v. Ladjing, 30 N. Y. Misc. (Sup. Ct.) 12, 61 N. Y. Supp. 840 (1899); Simpson v. Rourke, 13 N. Y. Misc. (N. Y. City Cts.) 230, 34 N. Y. Supp. 11 (1895).

[3] Sproule, Armstrong & Co. v. Ford & Warren, 13 Ky. (3 Litt.) 25 (1823); 6 AM. JUR. 191; 6 C. J. 1102-3; 8 C. J. S. 248.

[4] 6 AM. JUR. 194; 6 C. J. 1104; 8 C. J. S. 249.